# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1910.

No. 241

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

PIERRE GRIMAUD AND J. P. CARAJOUS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

FILED JUNE 8, 1911.

(21716)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1909.

No. 490.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

PIERRE GRIMAUD AND J. P. CARAJOUS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

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19190—09——1

a Supreme Court of the United States.

THE UNITED STATES OF AMERICA, PLAINTIFFS IN ERROR,
*vs.*
J. P. CARAJOUS AND PIERRE GRIMAUD, DEFENDANTS IN ERROR.

*Transcript of record.*

Upon writ of error to the United States District Court for the Southern District of California, Northern Division.

b *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

*The President of the United States of America to the Honorable Olin Wellborn, Judge of the District Court of the United States for the Southern District of California, greeting:*

Because in the record and proceedings, as also in the giving, making, rendition, entering, and filing of the decision and judgment sustaining the demurrer of the defendants, Pierre Grimaud and J. P. Carajous, to the indictment and dismissing said indictment in that certain cause in the said District Court of the United States for the Southern District of California, Northern Division, before you, in which the United States of America is plaintiff and the said Pierre Grimaud and J. P. Carajous are defendants, a manifest error hath happened to the great damage of the said plaintiff The United States of America, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the
c record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at the city of Washington, in the District of Columbia, within thirty days from the date hereof, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

DARK PAGE BLEED THRU

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 18th day of May, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-third.

[SEAL.] WM. M. VAN DYKE,
*Clerk of the Circuit Court of the United States, in and for the Southern District of California, Ninth Circuit.*

The above writ of error is hereby allowed.

OLIN WELLBORN,
*District Judge.*

d I hereby certify that a copy of the within writ of error was on the 18th day of May, 1909, lodged in the clerk's office of the said United States District Court for the Southern District of California, for the said defendants in error.

[SEAL.] E. H. OWEN,
*Clerk of the United States District Court, Southern District of California.*

e (Indorsed:) Original. No. 2 Crim. N. D. In the District Court of the United States for the Southern District of California, Northern Division. The United States of America, plaintiffs, vs. Pierre Grimaud and J. P. Cazajous, defendants. Writ of error. Filed May 18th, 1909. E. H. Owen, clerk.

f *Citation.*

UNITED STATES OF AMERICA, *ss:*

*The President of the United States of America to Pierre Grimaud and J. P. Carajous, defendants in error, and to W. W. Kaye, esquire, their attorney, greeting:*

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Southern District of California, Northern Division, wherein the United States of America is plaintiff and you are defendants in error, to show cause, if any there be, why the decision and judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America, this 18th day of May, A. D. 1909, and

of the Independence of the United States the one hundred and thirty-third.

[SEAL.] OLIN WELLBORN,
*District Judge for the Southern District of California.*

Attest: E. H. OWEN,
*Clerk, U. S. District Court, Southern District of California.*

g Service of the within citation and receipt of a copy thereof is hereby admitted this 19th day of May, A. D. 1909.

W. W. KAYE,
*Attorney for Pierre Grimaud and J. P. Carajous, defendants in error.*

h (Indorsed:) Original. No. 2 Crim. N. D. In the District Court of the United States for the Southern District of California, Northern Division. The United States of America, plaintiffs, vs. Pierre Grimaud and J. P. Cazajous, defendants. Citation. Filed May 20th, 1909. E. H. Owen, clerk.

i The answer of the judge of the District Court of the United States of America in and for the Southern District of California, Northern Division:

The record of all proceedings of the complaint whereof mention is within made, with all things touching same, we certify under the seal of our said District Court to the Supreme Court of the United States, in a certain schedule to this writ annexed, as within we are commanded.

By the court.

[SEAL.] E. H. OWEN, *Clerk.*

j *Names and addresses of attorneys.*

For plaintiff in error: A. I. McCormick, esq., United States attorney, Tajo Building, Los Angeles, California; Frank Stewart, esq., assistant United States attorney, Tajo Building, Los Angeles, California.

For defendants in error: W. W. Kaye, esq., Hopkins Building, Bakersfield, California.

1 In the District Court of the United States for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
J. P. CARAJOUS AND PIERRE GRIMAUD, DEFENDANTS. } No. 2, Crim.

*Transcript of record.*

2 In the District Court of the United States for the Southern District of California, Northern Division.

At a stated term of said court, begun and holden at the city of Fresno, within and for the Northern Division of the Southern Dis-

trict of California, on the second Monday in November, in the year of our Lord one thousand nine hundred and seven, the grand jurors of the United States of America, within and for the division and district aforesaid, on their oaths present:

That, under and pursuant to the authority conferred by the act of Congress approved June 4th, 1897, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1897, and for other purposes" (30 Statutes at Large, page 35), and the acts of Congress amendatory thereof and supplemental thereto, the Secretary of Agriculture did, on the 12th day of June, 1906, duly make, promulgate, and establish certain rules and regulations for the purpose of regulating the occupancy and use of the public forest reservations of the United States and preserving the forests thereon from destruction; that among the said rules and regulations so made, promulgated, and established by the said Secretary of Agriculture on the said 12th day of June, 1906, is the following, to wit:

"Regulation 45. All persons must secure permits before grazing any stock in a forest reserve, except the few head in actual use by prospectors, campers, and travelers, and milch or work animals not exceeding a total of six head owned by bona fide settlers residing in or near a forest reserve, which are excepted and require no permit."

That prior to the 26th day of April, 1907, the President of the
3 United States, under, pursuant to, and by virtue of the Act of Congress of March 3, 1891 (— Statutes at Large, page —) by executive proclamation in that behalf, duly and regularly set apart and reserved certain lands in the State of California, including the lands in the county of Kern hereinafter mentioned, as a public forest reservation, and the said lands so set apart and reserved as aforesaid ever since the date of said proclamation have been, and now are, a public forest reservation, known as and called the Sierra Forest Reserve.

That J. P. Carajous and Pierre Grimaud, whose full and true names are to the grand jurors unknown, each and all late of the Northern Division of the Southern District of California, heretofore, and while the aforesaid regulation was in full force and effect, to wit, on the 26th day of April, in the year one thousand nine hundred seven, at the county of Kern, within said division and district aforesaid, and within the jurisdiction of this honorable court, did knowingly, wilfully, wrongfully, and unlawfully pasture and graze, and cause and procure to be pastured and grazed, certain sheep (the exact number of which sheep is to the said grand jurors unknown) upon certain lands in said county of Kern within the limits of and a part of said Sierra Forest Reserve and the southern division thereof, without having theretofore or at any time secured or obtained a permit or any permission for the said pasturing or grazing of said sheep, or any of them, as required by the said rules and regulations of the Secretary of Agriculture as aforesaid; that said sheep, so by the said

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J. P. Carajous and Pierre Grimaud pastured and grazed, and caused to be pastured and grazed, upon and within the limits of the said southern division of the said Sierra Forest Reserve as aforesaid,
were not then and there, or at all, in actual use by any pros-
4 pector, camper, or traveler, nor were the said sheep, or either or any of them, milch or work animals, owned by any bona fide settler or settlers residing in or near a forest reserve.

Contrary to the form of the statutes of the United States in such case made and provided, and against the peace and dignity of the said United States.

OSCAR LAWLER,
*United States Attorney.*

(Endorsed:) No. 2, Crim. United States District Court. Southern District of California, Northern Division. The United States of America vs. Pierre Grimaud and J. P. Carajous. Indictment for violation of the act of June 4, 1888 (25 Stats. at Large, p. 166), and the act of June 4, 1897 (30 Stats. at Large, p. 11), and regulations of the Secretary of Agriculture.

Names of witnesses examined before the said grand jury on finding the foregoing indictment: W. B. Greeley, John W. Weldon, Sam'l P. Allen. A true bill. Chris. Jorgensen, foreman. Presented and filed in open court this 12th day of November, A. D. 1907. E. H. Owen, clerk. By Wm. M. Van Dyke, deputy clerk. Oscar Lawler, United States attorney.

5 UNITED STATES OF AMERICA,
*Southern District of California, ss.*

*To the marshal of the United States of America for the Southern District of California, and his deputies or any or either of them, greeting:*

Whereas, at a District Court of the United States of
[SEAL.] America for the Southern District of California, northern Division, begun and held at the city and county of Fresno, within and for the district aforesaid, on the 12th day of November, in the year of our Lord one thousand nine hundred and seven, the grand jurors in and for the said district and division brought into said court a true bill of indictment against J. P. Cazajous and Pierre Grimaud for knowingly, wilfully, wrongfully, and unlawfully grazing and pasturing sheep on a forest reserve in violation of the act of June 4, 1888, and the act of June 4, 1897, and rules and regulations of the Secretary of Agriculture relative to grazing and pasturing stock on forest reserves, as by the same indictment, now remaining on file and of record in said court, will more fully appear; to which indictment the said J. P. Carajous and Pierre Grimaud has not yet appeared or pleaded.

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said

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J. P. Carajous and Pierre Grimaud and them bring before the said court, at the United States district court room, in the city and county of Fresno, to answer the indictment aforesaid.

6 Witness the Hon. Olin Wellborn, judge of the said District Court, and the seal thereof, at the city and country of Fresno, the 12th day of November A. D. 1907.

Attest:

E. H. OWEN, *Clerk*,
By CHAS. N. WILLIAMS,
*Deputy Clerk.*

OSCAR LAWLER,
*U. S. Attorney.*

*Marshal's office.*

UNITED STATES OF AMERICA,
*Southern District of California:*

In obedience to the warrant I have the bodies of the said J. P. Cazajous, Pierre Grimaud, before the Honorable H. I. Tuppmann, United States commissioner at Bakersfield in and for the Southern District of California, this 20th day of December A. D. 1907.

County of Kern.

LEO V. YOUNGWORTH,
*U. S. Marshal*,
By JOS. P. COYLE,
*Deputy U. S. Marshal.*

(Endorsed:) Marshal's Doc. No. 2794, No. 2 Crim. United States District Court, Southern District of California, Northern Division. The United States of America vs. Pierre Grimaud and J. P. Cazajous. Bench warrant. Bailed fixed at $500.00. Oscar Lawler, U. S. attorney. Filed December 23rd, 1907. E. H. Owen, Clerk.

7 In the District Court of the United States for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA
*vs.*
PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS.

*Demurrer to the indictment.*

Come now the defendants above named, Pierre Grimaud and J. P. Carrajous, and demur to the indictment returned and filed herein, and as grounds of demurrer allege:

I. That the facts stated in said indictment do not constitute a public offense, or a public offense against the United States.

II. That the acts of Congress referred to in said indictment, making it an offense to violate rules and regulations made and promulgated by the Secretary of Agriculture are unconstitutional in that

they are an attempt by Congress to delegate its legislative power to an administrative officer.

W. W. KAYE,
*Attorney for Defendants.*

(Endorsed:) No. 2 Crim. U. S. Dist. Court, Southern Dist. of Cal., No. Div. The United States of America *vs.* Pierre Grimaud and J. P. Carajous. Demurrer to the indictment. Filed Nov. 15, 1907. E. H. Owen, clerk, Chas. N. Williams, deputy. W. W. Kaye, attorney for defendants.

8 At a stated term, to wit, the May term, A. D. 1908, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, held at the court room thereof, in the city of Fresno, on Monday, the 4th day of May, in the year of our Lord one thousand nine hundred and eight.

Present: The Honorable Olin Wellborn, district judge.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
*vs.*
PIERRE GRIMAUD AND J. P. CARAJOUS, defendants.
} No. 2, Crim., N. D.

Indictment for violation of act of June 4, 1888, act of June 4, 1897, and rules and regulations of the Secretary of Agriculture relative to grazing and pasturing stock on forest reserves. This cause coming on this day to be heard on defendants' demurrer to the indictment; now, on motion of A. I. McCormick, esq., assistant U. S. attorney, and with the consent of defendants' counsel, it is ordered that said demurrer be, and the same hereby is, submitted to the court for its consideration and decision upon briefs to be served and filed as follows: On behalf of the Government within thirty (30) days, and on behalf of defendants within thirty (30) days thereafter.

9 At a stated term, to wit, the November term, A. D. 1908, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, held at the court room in the city of Fresno, on Monday, the 9th day of November, in the year of our Lord one thousand nine hundred and eight.

Present: The Honorable Olin Wellborn, district judge.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
*vs.*
PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS.
} No. 2, Crim., N. D.

Indictment for violation of act of June 4, 1888, and act of June 4, 1897, and rules and regulations of the Secretary of Agriculture, relative to grazing and pasturing stock on the forest reserves. Oscar Lawler, esq., U. S. attorney, and Frank Stewart, esq., assistant U. S.

attorney, present as counsel for the U. S., and W. W. Kaye, esq., appearing as counsel for defendant; this cause coming on this day to be heard on a demurrer to the indictment; now, good cause appearing therefor, it is ordered that the same be, and hereby is, submitted, without oral argument, upon the briefs heretofore filed herein, and upon a reply brief to be filed within sixty (60) days. By stipulation of counsel for the respective parties, it is further ordered that said demurrer may be disposed of, and the necessary orders in reference thereto made by the court sitting at Los Angeles, in the Southern Division of this district, with the same force and effect as if the same had been disposed of and the orders relating thereto made by the court sitting at Fresno, in the Northern Division of said district.

10 In the District Court of the United States for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
*vs.*
PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS. } No. 2, Crim., N. D.

Indictment for violation of act of June 4, 1888, and act of June 4, 1887, and rules and regulations of the Secretary of Agriculture, relative to grazing and pasturing stock on forest reserves. This cause having heretofore been submitted to the court for its consideration and decision, on a demurrer to the indictment herein, and the court having duly considered the same, and being fully advised in the premises, now reads and files its conclusions thereon, and it is by the court ordered that said demurrer be, and the same hereby is, sustained, and that said indictment be, and the same hereby is, dismissed; to which rulings of the court, the plaintiffs, by A. I. McCormick, esq., U. S. attorney, ask and are allowed to note exceptions, which are hereby entered herein.

Monday, 3rd of May, 1909.
May term, A. D. 1909.

11 In the District Court of the United States in and for the Southern District of California, Northern Division.

THE UNITED STATES
*vs.*
PIERRE GRIMAUD, ET AL. } No. 2, Crim.

I, E. H. Owen, clerk of the District Court of the United States in and for the Southern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the above-entitled cause.

Attest, my hand and the seal of said court, this 3rd day of May, A. D. 1909.

[SEAL.]

E. H. OWEN, *Clerk.*
CHAS. N. WILLIAMS,
*Deputy Clerk.*

DARK PAGE BLEE

(Endorsed:) No. 2, Crim. U. S. District Court, Southern District of California, Northern Division The United States vs. Pierre Grimaud and J. P. Carajous. Judgment roll. Filed May 3rd, 1909. E. H. Owen, clerk; Chas. N. Williams, deputy.

12 In the District Court of the United States for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
*vs.*
PIERRE GRIMUND AND J. P. CARAJOUS, DEFENDANTS. } No. 2, Crim., N. D.

*Conclusions of the court on demurrer.*

The charge against defendants is that of grazing sheep without permission in the Sierra Forest Reserve.

By act of Congress, approved June 4th, 1897, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year 1897, and for other purposes" (30 U. S. Stat. L., 35; Compiled Statutes, 1901, page 1540), it is provided, among other things, that:

13 "The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States."

The jurisdiction of the Secretary of the Interior over forest reserves was subsequently transferred to the Secretary of Agriculture, and thereafter, on June 12th, 1906, the latter official promulgated the following:

"Regulation 45. All persons must secure permits before grazing any stock in a forest reserve, except the few head in actual use by prospectors, campers, and travellers, the milch or work animals not exceeding a total of six head owned by bona fide settlers residing in or near a forest reserve, which are excepted, and require no permit."

A demurrer to the indictment has been interposed on the grounds that the act of Congress above mentioned, so far as it attaches a penalty to any violations of the rules and regulations thereafter to be made by the Secretary of the Interior, is void, because it does not completely or at all define the acts to be punished, and because it attempts a delegation of legislative power to an executive officer.

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14 These two grounds will be considered in the order in which I have stated them.

The Supreme Court of the United States has often declared, in unmistakable terms, that there can be no crime against the authority of the United States except where the forbidden act is defined and penalized by statute. (U. S. vs. Hudson, 7 Cranch, 32; U. S. vs. Coolidge, 1 Wheat., 415; U. S. vs. Britton, 108 U. S., 199, 206; U. S. vs. Eaton, 144 U. S., 677.) And the Circuit Court of Appeals for this circuit has spoken in decided terms to the same effect. (Peters vs. United States, 94 Fed., 127, 131.)

In United States vs. Hudson, supra, where it is held that the courts of the United States have no common law jurisdiction in criminal cases, the Supreme Court uses the following language:

"The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense."

In Peters vs. United States, supra, the court says:

"It must be borne in mind, that the national courts do not resort to common law as a source of criminal jurisdiction. Crimes and offenses cognizable under the authority of the United States can only be such as are expressly designated by law. It devolves upon Congress to define what are crimes, to fix the proper punishment, and to confer jurisdiction for their trial. U. S. vs. Walsh, 5 Dill., 60, Fed. Cas. No. 16636; U. S. vs Martin, 4 Cliff., 156, Fed. Cas. No. 15728; In re Greene, 52 Fed., 104; Swift vs. Railroad Co., 64 Fed., 59; U. S. vs. Hudson, 7 Cranch., 32; U. S. vs. Coolidge, 1 Wheat., 415; U. S. vs. Britton, 108 U. S., 199."

The same doctrine has been elsewhere declared as follows:

15 "In the consideration of this indictment it should be borne in mind that there are no common-law offenses against the United States; that the federal courts cannot resort to the common law as a source of criminal jurisdiction; that crimes and offenses, cognizable under the authority of the United States, are such, and only such, as are expressly designated by law; and that Congress must define these crimes, fix their punishment, and confer jurisdiction to try them." (In re Greene, 52 Fed., 104, 111.)

There can be no pretence that Congress itself has defined as a crime the act for which defendants are here indicted, namely, grazing sheep without permission in a forest reserve. The statute itself does not forbid or make any reference whatever to sheep grazing, nor in the remotest degree suggest that Congress had it at all in mind, and, according to the Government's own theory, it did not become a crime until nine years after the passage of the statute which the Government claims made it criminal, and then only because of the promulgation of an administrative rule which it contravenes. The mere statement of the theory, it seems to me, condemns it, and after much reflection I have now no hesitancy in holding that the statute, in so far as it affixes punishment to infractions of executive rules and regulations

DARK PAGE BLEED

thereafter to be promulgated, is incomplete and wholly inadequate to form the basis of a criminal prosecution.

It must be borne in mind that part of a statute may be unconstitutional and void and the residue constitutional and valid (28 Am. & Eng. Ency. of Law, 2d ed., p. 570), and that there is no controversy here over the validity of any part of the act of Congress in question except the provision specifically indicated.

16 That provision was not before the court in Dastervignes vs. United States, 122 Fed., 30, and although it is mentioned by way of recital in the syllabus, there is not the slightest reference to it in the opinion nor anything whatever to show or suggest its pertinency. Indeed, the question could not have arisen there, because the case was not a criminal prosecution, involving, and which alone could involve, the matter of punishment, but simply a civil suit to enjoin grazing, and to which suit the penalty clause of the statute had no possible relation or pertinency.

The court specifically points out that part of the act which was before it and held to be constitutional, as follows, underscoring mine:[a]

"It must be admitted that the legislative authority of the United States is vested in Congress, and that Congress has no authority to delegate legislative power to the Secretary of the Interior, or to any administrative officer the authority to make laws; and if the act of Congress approved June 4, 1897 (30 Stat. 35, U. S. Comp. St. 1901, p. 1540), is legally susceptible of the construction contended for by appellants, it would clearly be unconstitutional. By that act the Secretary of the Interior was authorized to '*make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction.*' Does this language delegate any power to the Secretary of the Interior to make a law, or does it simply confer upon the Secretary an authority to adopt such rules and regulations as to him may seem fit and proper in order to secure the objects for which the reservation was created; and such acts to be exercised under and in pursuance of the law enacted by Congress? Let us see. Congress cannot delegate its power to make a law, but it can make a law to delegate a power

17 to an administrative officer to determine a fact or condition of affairs in regard to which the law makes its own action depend."

The court nowhere holds, or intimates, that the statute is complete or valid in so far as it attempts to punish such acts as might thereafter be forbidden by the Secretary of the Interior; but it may be fairly inferred, that the court would have held to the contrary, if the question had been presented, from the following expressions at page 34, underscoring mine:[a]

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[a] The underscored matter is that printed in italics.

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"The Secretary, by adopting this rule, acted simply as the arm that carries out the legislative will. He did not invade any of the functions of Congress. He did not make *any law*, but he exercised the authority given to him, and made *rules* to preserve the forests on the reservation from destruction. *Such rules*, within constitutional limits, have the *force and effect of* law, and it is the duty of courts to protect and enforce them in order to uphold the law as enacted by Congress."

This declaration, clear and emphatic, that executive rules are not laws, taken in connection with the elementary principle already adverted to, that nothing but a law can define or create a crime absolutely determines the incompleteness and inadequacy of said act of Congress as a penal statute.

Nor is the case of Union Bridge Co. vs. United States, 204 U. S., 364, applicable here. The statute there involved declares the maintenance, after notice from the Secretary of War, of any bridge which unreasonably obstructs free navigation to be a misdemeanor, punishable by a fine not exceeding five thousand dollars, and, furthermore, in substance and effect, though not in terms, makes the final order of the Secretary, for which it provides, conclusive evidence as to the fact of unreasonableness. (30 U. S. Stat. L., 1121, 1153.)

18 This statute, it will be seen, fully defines the crime, affixes the punishment, and is, therefore complete within itself. Its only peculiarity is, that, as I have already indicated, it impliedly establishes in that class of cases a special rule of evidence. This, however, is clearly within the scope of legislative power, and not unfrequently done, either by implication as above shown, or in express terms as appears from the instance below cited. Thus, section 16 of the act of Congress approved August 6, 1846, entitled "An act to provide for the better organization of the Treasury, etc.," contains a provision, subsequently embodied in section 5494 of the Revised Statutes, which reads as follows:

"Upon the trial of any indictment against any person for embezzling public money under the provisions of the six preceding sections, it shall be sufficient evidence, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the Treasury, as required in civil cases, under the provisions for the settlement of accounts between the United States and receivers of public money." (Sec. 5494 U. S. Rev. St., 9 U. S. Stat. L., 63.)

Examples to the same effect might be multiplied, but the one just referred to sufficiently illustrates the exercise of legislative power in the matter of special procedure.

While the conclusion which I have above announced as to the incompleteness of the statute here in question disposes of this case favorably to the defendants, yet, inasmuch as the other ground of the demurrer is the one most largely, if not wholly, discussed in the

briefs, and touches closely a principle of high moment, I shall give it hurried consideration.

There is no feature of our Government more distinctive or beneficent than the division of its powers into separate departments, and, therefore, the rule which confines the making of laws to Congress is at once elementary and inflexible.

19 Concerning this rule, the Supreme Court of the United States has made the following declaration:

"That Congress can not delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." (Field vs. Clark, 143 U. S., 650, 692.)

There can be no controversy whatever about the principle itself: the only room for dispute lies in its application. In the case at bar the sta'ute does not declare the grazing of sheep, without permission, to be a crime, nor does it make the slightest reference to that matter, but declares that whatever the Secretary of the Interior may thereafter prohibit shall be a misdemeanor. Congress merely prescribes a penalty and then leaves it to the Secretary of the Interior to determine what acts shall be so punishable. Thus it will be seen that the very essence of the alleged crime, namely, what act shall constitute it, is not fixed by Congress, but wholly confided to the discretion of an administrative officer. If this does not necessarily involve a delegation of legislative power, it is difficult to conceive of a statute challeng'able on that ground.

While arguments ab inconvenienti of themselves are rarely conclusive, yet in many cases they are entitled to much weight, and this is one of the cases; for, if the contentions which the Government here urges were to prevail, Congress, so far as any legal difficulties are concerned, could easily abdicate in favor of the executive department practically all its powers.

To illustrate: Among the large number of crimes relating to the postal service is the use of the mails for immoral and fraudulent purposes. Congress could repeal existing lesislation on this subject, and, by a new law, authorize and require the Postmaster-General to protect the mails against immoral and fraudulent uses, by suitable rules and regulations, and further provide, that any violation of

20 such rules and regulations should be punished in a specified manner, and, under this grant of authority, said officer could occupy with regulations, springing from his own discretion and will, but enforc'able through penal sanctions, the large field now covered by the criminal laws on that subject, and in this way it would be possible to confer upon the administrative branches of the Government powers whose full exercise would substitute with penalized rules well nigh the whole volume of federal criminal law. It is needless to add that no reasonable interpretation of the Constitution will admit of such a startling result.

ED THRU

This precise question has been under review and ably discussed in another jurisdiction, as follows:

"It is fundamental that the citizen has the right to rely upon the statutes of the United States for the ascertainment of the acts which constitute an infraction of its laws. This principle was expressed by the Supreme Court in re Kollock, 165 U. S., 533, as follows:

"'We agree that the courts of the United States, in determining what constitutes an offense against the United States, must resort to the statutes of the United States, enacted in pursuance of the Constitution.'

"A citizen desiring to obey the laws would search the acts of Congress in vain to find that grazing sheep upon a forest reserve without the permit of the Secretary of Agriculture is a criminal offense. It has been suggested that the acts under which the indictment is drawn give notice that the Secretary may make rules and regulations, and that the search would not be complete and the inquiry concluded until it be ascertained whether he has made any rules and regulations, the violation of which it is expressly declared shall be a criminal offense.

21 "But here we are led back to the delegation of legislative power. The rules prescribed by the heads of departments are not necessarily promulgated. While they may be procured, they are not as easily available as are the statutes of the United States; nor does our system contemplate an examination of those rules for the ascertainment of that which may or may not be a crime, for the right to prohibit a given thing under penalty belongs to Congress alone.

* * * * * * *

"In discussing the statute the Supreme Court laid down this wholesome doctrine:

"'Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted "in violation of a public law, either forbidding or commanding it." (4 American & English Encyclopedia of Law, 642; 4 Bl. Com., 5.) It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing "required by law" in carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under section 18 of the act. * * * It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense, and we do not think that the statutory authority in the present case is sufficient.'

"To like effect are United States vs. Maid (D. C.), 116 Fed., 650, and United States vs. Blasingame (D. C.), 116 Fed., 654.

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22 "Have we here a case involving the delegation of legislative power? That Congress intended to punish by penalty made certain the violations of regulations made by the Secretary of Agriculture, and to declare the same a criminal offense, is beyond controversy. But the grazing of stock upon the forest reserves has not been prohibited by any congressional act. The prohibition rests entirely upon regulations made by the Secretary. Regulation No. 9 prescribes, as we have seen, that all persons before grazing sheep in a forest reserve must secure a permit, and any person responsible for grazing the same without a permit becomes a violator of the law; that is, whoever violates a rule promulgated by the Secretary violates a law passed by Congress. The evident embarrassment attending the making of regulation 9, in an attempt to bring it within the act of Congress, is apparent by the language used. Clearly there was a keen appreciation of the necessity of supplying that which Congress had failed to enact, and this was attempted by the use of the words 'is liable to punishment for violation of the law.' At times the line is somewhat indistinct between that which constitutes the delegation of legislative power and the delegation of administrative authority.

"This case does not fall within the rule so well explained and amplified by the authorities, that the executive branch of the Government may make proper rules and regulations for carrying into effect the legislative will of Congress. The President may be authorized to declare by proclamation that a law shall go into effect upon the happening of a certain contingency. The Secretary of the Treasury may make rules and regulations for the enforcement of the revenue statutes and the like. So may the heads of all the departments make like regulations, but the authority to do so must be expressly delegated, and the law must be complete in itself. The rules and
23 regulations may only be prescribed for carrying out what Congress has expressly declared to be the law. Such powers do not pertain to the legislative functions, but are referable to administrative duties. Congress cannot leave a statute to be enlarged upon either by the courts or the executive department. It cannot authorize any other branch of the Government to define that which is purely legislative, and that is purely legislative which defines rights, permit things to be done, or prohibits the doing thereof. Certainly here it is the Secretary of Agriculture who has undertaken to enact this law. He it is who has designated that which constitutes the crime. The thing prohibited, the thing for which the party is to be punished, the act which is the offense, is prescribed by the Secretary, and not enacted by Congress. As we have seen, this cannot be done.

"The objection to the indictment is the absence of a law defining the act therein charged as a criminal offense. Upon that ground the demurrer must be sustained, and the defendant discharged." (United States vs. Matthews, 146 Fed., 306, 308.)



:ED THRU

See also United States vs. Maid, 116 Fed., 650; and United States vs. Blasingame, 116 Fed., 654.

In the former of said cases, at page 652, it is said:

"There is another aspect of the case, however, which furnishes as strong an argument against plaintiff's contention as the one just considered, and it is this: A department regulation may have the force of law in a civil suit to determine property rights, as in Cosmos Exploration Co. vs. Gray Eagle Oil Co., supra, and yet be ineffectual as the basis of a criminal prosecution. (U. S. vs. Eaton, supra.) The Supreme Court of the United States, in the case last cited, marks the distinction thus:

24 "'Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them; and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense.'

"The obvious ground of said distinction is that to make an act a criminal offense is essentially an exercise of legislative power, which can not be delegated, while the prescribing by the President or head of a department, thereunto duly authorized, of a rule, without penal sanctions, to carry into effect what Congress has enacted, although such rule may be as efficacious and binding as though it were a public law, is not a legislative but ministerial function."

In the latter of said cases, United States vs. Blasingame, 116 Fed., 654, the opinion is brief and as follows:

"I am of opinion that the act (act June 4, 1897, 30 Stat., 11) entitled 'An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes,' in so far as it declares to be a crime any violation of the rules and regulations thereafter to be made by the Secretary of the Interior for the protection of forest reservations, is in substance and effect a delegation of legislative power to an administrative officer. While the Supreme Court of the United States, in Field vs. Clark, 143 U. S., 649, and also In re Kollock, 165 U. S., 526, held that there was no unconstitutional delegation of power in either case, yet, applying

25 and observing here the principles and distinctions there enunciated and recognized, it is impossible to escape the conclusion which I have announced. U. S. vs. Eaton, 144 U. S., 677, although not precisely like the case at bar, may also be aptly cited in support of said conclusion. Clear statements and pertinent applications of the doctrine announced by the Supreme Court of the United States in the two cases first above cited that legislative power can be exercised only by that branch of the Government to which the Constitution commits it, will be found in People vs. Parks, 58 Cal., 624; Ex Parte

Cox, 63 Cal., 21; and Board of Harbor Com'rs vs. Excelsior Redwood Co., 88 Cal., 491."

I have given to the extract quoted in plaintiffs' brief from an opinion by former Attorney-General Griggs, that respectful attention, which the high character and distinguished ability of its writer, as well as the great office he then held, demands, and can but think that the quotation rests upon a superficial view of the subject.

It starts out with an assumption, which, to my mind, is manifestly erroneous, namely, that "The statute proclaims the punishment for an offense which in general terms is defined by law, the regulation dealing only with a matter of detail and administration necessary to carry into effect the object of the law." The statute, and I refer, of course, only to that provision now under consideration, so far from proclaiming the punishment for an offense which in general terms is defined by law, does not even purport to punish a transgression of law, but the prescribed penalty is affixed to the violation of such rules as the Secretary in his discretion might subsequently make, and which in fact, as I have already indicated, were not made until nine years after the statute was enacted.

26 Again, the quotation: "Suppose Congress had provided that the occupation or use of a forest reservation by any person, without permission of the Secretary, should be a misdemeanor, would this not be a valid exercise of legislative power?" The answer to this question must be in the affirmative, because, in the case supposed, the statute is complete within itself. The legislative power has been duly exercised in prescribing the act which constitutes the crime; but, when the quotation goes on to add, "The present statute does no more," another erroneous postulate, as it seems to me, is assumed. Congress has nowhere declared that the grazing of sheep in a forest reservation, without permission of the Secretary, is a misdemeanor, but the alleged crime results only from the joint operation of the statute and a rule subsequently made by the Secretary. Without the rule there is nothing to which the penalty can attach, and in order to charge the so-called crime, it is necessary, as has been done here, to allege the promulgation and infraction of the rule, without which the statute is wholly devoid of force or effect.

The cases mainly relied on by the Government are, Dastervignes vs. United States and Union Bridge Company vs. United States, supra. In the former, as I have already shown, the penalty clause of the statute was not before the court, and, besides, there are views expressed in the opinion utterly incompatible with the constitutionality of said clause, and that case, therefore, so far as applicable at all, is against, rather than favorable, to the government's claim.

In the other case, Union Bridge Company vs. The United States, the crime was fully defined, and the punishment fixed by the statute, and the duties devolved upon the Secretary of War were only administrative acts in aid of the execution of the statute.

27 In its opinion, at page 382, the court quotes approvingly from a prior decision, Field vs. Clark, as follows:

"'He was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea, and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed.' Again: 'The true distinction,' as Judge Ranney speaking for the Supreme Court of Ohio has well said, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made.' Cincinnati, Wilmington &c. Railroad vs. Commissioners, 1 Ohio St., 77."

Again, at page 385, the court says:

"As appropriate to the object to be accomplished, as a means to an end within the power of the National Government, Congress, in execution of a declared policy, committed to the Secretary of War the duty of ascertaining all the facts essential in any inquiry whether particular bridges, over the waterways of the United States, were unreasonable obstructions to free navigation. Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through executive officers, could have determined for itself, primarily, the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could by direct legislation have

28 required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the waterway in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case, separately, would be impracticable in view of the vast and varied interest which require national legislation from time to time. By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power."

There the crime was created, that is, it was defined and the punishment affixed by the statute itself, and, as above stated, the duties which the statute devolved upon the Secretary of War were only in aid of its enforcement.

If I am correct in the views which I have expressed of the Dastervignes case, then two of the other cases relied on by the Government, United States vs. De Guierre, 152 Fed., 568, and Dent vs. United States, 76 Pac. Rep., 455, are unfavorable to its contention, because in each a contrary decision was overruled, solely on the authority, and under a mistaken apprehension of the Dastergivnes case, indicating that both of said courts, if uncontrolled by the Dastervignes case, would hold the statute void. On the first hearing in the latter case,

Dent vs. United States, 71 Pac., 920, 922, the opinion is elabo-
29 rate, able, and convincing, and, with uncommon force and clearness, compresses into a single paragraph its unanswerable argument, as follows:

"We think the fatal defect of the act, so far as the question in case at bar is concerned, is that unlimited power is given thereby to the Secretary of the Interior to determine what is and what is not a crime under the act. It is left to his discretion to determine the acts or omissions which shall render all persons amenable to the criminal law. The act does not prohibit the grazing of sheep on forest reserves, and there is no statute which prohibits it. Whether or not in all cases the authority of the several heads of the departments of the Federal Government to make regulations for their respective departments is limited to the precise and literal terms of the acts of Congress applicable thereto, we think that, in so far as by such regulations an act is defined to be a crime which is not so defined by any public law, and which, without such regulation, would not be a crime, or punishable as such, it is an exercise of law-making power, vested by the Constitution, not in such official, but in Congress alone, and as such is unconstitutional."

In most, if not all, of the cases relied upon by the Government, the authority delegated was limited to the ascertainment of facts in particular cases, and these were held to be administrative acts. In the case at bar, however, there is no pretence that the Secretary of Agriculture has been charged with the duty or has acted in the ascertainment of the facts, of particular cases, but what he has undertaken to do is to determine and define a crime, which, according to all the authorities, is a matter of legislative discretion.

In United States vs. Shannon, 151 Fed., 863, 865, the court says:

30 "Let us remember that we are not now dealing with a question of a regulation by the Secretary of the Interior, which makes a violation thereof a crime. Were such the point of inquiry, principles not necessarily here applicable would have to be discussed. United States vs. Eaton, 144 U. S., 677; United States vs. Mathews (D. C.), 146 Fed., 306. We can therefore eliminate any question of the liberty of the citizen, and proceed to inquire into the matter of the policy of the State concerning cattle growers, to ascertain the force of that policy in the present instance."

From this it appears that the court, in the last case, was careful to avoid any expression which might be applied to the question here under consideration.

Plaintiff, in its brief, advances the proposition that "The Government, in dealing with forest reservations, is acting not only in its sovereign capacity, but as a landed proprietor," and seeks to draw therefrom the inference that trespasses upon such reservations becomes crimes without legislation to that effect. This inference, to my mind, is obviously a nonsequitur. The fact that the Government may be endeavoring to protect its own lands in no way affects the vital principle of our Constitution, as it is distinctively called by the Supreme Court, which forbids the delegation of legislative power.

In the clause quoted in plaintiff's brief with emphasis from Canfield vs. United States, 167 U. S., 518, 525, "If the act be construed as applying only to fences actually erected upon public lands, it is manifestly unnecessary, since the Government as an ordinary proprietor would have the right to prosecute for such a trespass," the words "prosecute for such a trespass," manifestly refer to civil suits, such as the one then before the court.

31 The government's contention on this branch of the case is fully met by the numerous Supreme Court decisions hereinbefore cited, to the effect that, under the federal system, there can be no crimes except such as are created, that is expressly defined and penalized, by an act of Congress.

The demurrer to the indictment will be sustained.

OLIN WELLBORN, *Judge.*

(Endorsed:) No. 2, Crim. U. S. District Court, Southern District of California, Northern Division. The United States vs. Pierre Grimaud et al. Conclusions of the court on demurrer. Filed May 3, 1909. E. H. Owen, clerk. Chas. N. Williams, deputy.

32 In the District Court of the United States in and for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS. } No. 2, Crim., N. D.

*Petition for writ of error.*

The United States of America, plaintiff in the above entitled action, feeling itself aggrieved by the decision and judgment of the above entitled court, rendered, given, made, and entered on the 3d day of May, 1909, sustaining the demurrer of the above named defendants to the indictment in this action and dismissing said indictment, comes now and petitions said court for an order allowing said plaintiff, The United States of America, to prosecute a writ of error to the honorable the Supreme Court of the United States from said decision

and judgment, and the whole thereof, under and according to the laws of the United States and especially under and by virtue of the provisions of the act of Congress of March 2, 1907, ch. 2564, 34 Statutes at Large, 1246, in that behalf made and provided, and said The United States of America prays that said petition for said writ of error may be allowed, and that said writ of error may issue, and that a proper transcript of the record, proceedings, and papers upon which said decision and judgment was given, made, rendered, and entered as aforesaid, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 18th day of May, 1909.

THE UNITED STATES OF AMERICA,
By A. I. MCCORMICK,
*United States Attorney for the Southern District of California.*

33 (Endorsed:) Original. No. 2, Crim., N. D. In the District Court of the United States for the Southern District of California, Northern Division. The United States of America, plaintiffs, vs. Pierre Grimaud and J. P. Cazajous, defendants. Petition for writ of error. Filed May 18th, 1909. E. H. Owen, clerk.

34 In the District Court of the United States in and for the Southern District of California, Northern Division.

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| THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* PIERRE GRIMAUD AND J. P. CARAJOUS, defendants. | No. 2, Crim., N. D. |

*Assignment of errors.*

Now comes the United States of America, plaintiff herein, and says that in the record and proceedings in the above entitled cause there is manifest error, and now makes, presents, and files the following assignment of errors, upon which said the United States of America will rely upon the prosecution of the writ of error in the above entitled cause:

I.

That the District Court of the United States in and for the Southern District of California, Northern Division, erred in sustaining the demurrer interposed by the defendants, Pierre Grimaud and J. P. Carajous, to the indictment in the said cause.

II.

That said District Court erred in ordering said indictment dismissed.

III.

That the said District Court erred in holding, deciding, and adjudging that said indictment did not state a public offense against the laws of the United States.

IV.

That the said District Court erred in holding, deciding, and adjudging that the act of Congress approved June 4, 1897, entitled, "An act making appropriations for sundry civil expenses of the
35 Government for the fiscal year 1897, and for other purposes" (30 Statutes at Large, 35, Comp. Stat., 1901, page 1540), in so far as it, taken in connection with the acts supplemental thereto and amendatory thereof, attaches a penalty to any violation of the rules and regulations thereafter made or to be made by the Secretary of the Interior or the Secretary of Agriculture is invalid and void, and is basing its said decision and judgment sustaining said demurrer and dismissing said indictment on that ground.

V.

That the said District Court erred in holding, deciding, and adjudging that said act of Congress of June 4, 1897, in so far as it, taken in connection with the acts supplemental thereto and amendatory thereof, authorizes and directs the Secretary of Agriculture to make rules and regulations to regulate the occupation and use of forest reserves and to preserve the forests thereon from destruction and attaches a penalty to any violation of said rules and regulations, is an unconstitutional delegation or attempt at delegation of legislative powers to an executive officer, and in basing its said decision and judgment sustaining said demurrer and dismissing said indictment on that ground.

VI.

That the said District Court erred in its construction of said act of June 4, 1897, wherein and whereby it held and decided that the said act of June 4, 1897, in so far as it, taken in connection with the acts supplemental thereto and amendatory thereof, authorizes and directs the Secretary of Agriculture to make certain rules and regulations and attaches a penalty to any violation of said rules and regulations, is invalid and void, because said act of Congress does not completely or at all define the acts to be punished, and in basing its decision and judgment sustaining said demurrer and dismissing said indictment on that ground.

36 VII.

That the said District Court erred in its construction of said act of June 4, 1897, wherein and whereby it held and decided that the said

act of Congress did not completely or at all define the acts prohibited and penalized thereby, and in basing its decision and judgment sustaining said demurrer and dismissing said indictment on that

VIII.

That the said District Court erred in holding, deciding, and adjudging that the said act of June 4, 1897, was invalid in that it did not completely or at all define the acts made criminal and penalized thereby, and in basing its decision and judgment sustaining said demurrer and dismissing said indictment on that ground.

IX.

That the said District Court erred in holding, deciding, and adjudging that the offense set forth and alleged in the indictment in this cause was not defined and penalized in said act of Congress of June 4, 1897, taken in connection with the acts supplemental thereto and amendatory thereof, and in basing its decision and judgment sustaining the said demurrer and dismissing said indictment on that

X.

That the said District Court erred in holding, deciding and adjudging said act of June 4, 1897, invalid and void as a basis for a criminal prosecution for a violation of the rules and regulations of the Secretary of Agriculture relating to the occupancy and use of forest reservations made and promulgated under and in pursuance of the provisions of said act of June 4, 1897.

37 XI.

That the said District Court erred in holding, deciding, and adjud'ing said act of June 4, 1897, invalid and void as a basis for a criminal prosecution for a violation of that certain rule or regulation known as and designated as "Regulation 45," duly made, promulgated, and established by the Secretary of Agriculture under and in pursuance of the provisions of said act of June 4, 1897, and the acts of Congress amendatory thereof and supplemental thereto, which said Regulation 45 is set forth in the indictment in said cause, and in basing its decision and judgment sustaining said demurrer on that ground.

XII.

The said District Court erred in holding, deciding, and adjud'ing that said act of June 4, 1897, when taken in connection with the rules and regulations made, promulgated, and established by the Secretary of Agriculture, under and in pursuance of said act, and the acts supplemental thereto and amendatory thereof, and in particular with Rule 45, set forth in the indictment herein, is invalid and void

as a basis for the offense set forth in the indictment herein, and basing its decision and judgment on that ground.

XIII.

That said District Court erred in holding, deciding, and adjudging said act of June 4, 1897, invalid and void as a basis for a criminal prosecution for violation of the rules and regulations of the Secretary of the Interior or the Secretary of Agriculture, made and established under and in pursuance of the provisions of said act, and the acts supplemental thereto and amendatory thereof, for the alleged reason that said act of June 4, 1897, did not in and by itself and independent of said rules and regulations specifically set forth and define
38 the precise acts prohibited and penalized, and in basing its decision and judgment sustaining said demurrer and dismissing said indictment on that ground.

XIV.

That the said District Court erred in holding said act of Congress of June 4, 1897, invalid in so far as it, taken in connection with the acts supplemental thereto and amendatory thereof, authorizes and directs the Secretary of Agriculture to make rules and regulations to regulate the occupancy and use of forest reservations and to preserve the forests thereon from destruction and attaches a penalty to any violation of said rules and regulations, for the alleged reason that it, the said act of Congress, does not completely or at all define the acts to be punished, and in basing its decision and judgment sustaining said demurrer on that ground.

XV.

That said District Court erred in holding that the Congress could not constitutionally delegate to the Secretary of the Interior or the Secretary of Agriculture the right and authority to make rules and regulations to regulate the occupancy and use of forest reserves and to preserve the forests thereon from destruction and provide that any violation of said rules and regulations, thereafter made and established in pursuance of said authority, should constitute a crime and be punishable as such, and in basing its said decision and judgment on that ground.

XVI.

That the said District Court erred in refusing to overrule said demurrer of said defendants and in refusing to compel said defendants and each of them to plead to the said indictment.
39 Wherefore, the said United States of America, plaintiff herein, prays that the said decision and judgment of the said District Court of the United States for the Southern District of California, Northern Division, and the whole thereof be in all things

reversed, and that the said United States District Court be directed to reinstate said indictment and to overrule the demurrer of said defendants and compel said defendants and each of them to plead to the indictment in said cause.

THE UNITED STATES OF AMERICA,
By A. I. McCORMICK,
*United States Attorney for the Southern District of California.*

(Endorsed:) Original. No. 2, Crim., N. D. In the District Court of the United States for the Southern District of California, Northern Division. The United States of America, plaintiffs, vs. Pierre Grimaud and J. P. Cazajous, defendants. Assignment of errors. Filed May 18th, 1909. E. H. Owen, clerk.

40 At a stated term, to wit, the January term, A. D. 1909, of the District Court of the United States of America in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Tuesday, the 18th day of May, in the year of our Lord one thousand nine hundred and nine.

Present: The Honorable Olin Wellborn, district judge.

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| THE UNITED STATES OF AMERICA, PLAINTIFFS, *vs.* PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS. | No. 2, Crim., Northern Division. |

Indictment for violation of act of June 4, 1888, and act of June 4, 1897, and rules and regulations of the Secretary of Agriculture, relative to grazing and pasturing stock on forest reserves. Now comes A. I. McCormick, esq., U. S. attorney, and presents herein a petition for writ of error to the Supreme Court of the United States, and an assignment of errors, which said papers are filed in open court; and thereupon, on motion of A. I. McCormick, esq., U. S. attorney, a bill of exceptions is settled, allowed, signed, and filed in open court, a certificate of the judge of the court and an order allowing writ of error to the Supreme Court of the United States are signed and filed in open court, and a citation is signed and issued in said cause.

41 In the District Court of the United States, in and for the Southern District of California, Northern Division.

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| THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS. | No. 2, Crim., N. D. |

*Bill of exceptions.*

Be it remembered that in this cause the indictment was duly returned, presented, and filed in open court on the 12th day of Novem-

ber, 1907, and that all due and regular proceedings being had, the defendants, Pierre Grimaud and J. P. Carajous, by their attorney, W. W. Kaye, esq., filed, on the 15th day of November, 1907, their joint demurrer to the indictment in said cause, which said demurrer was and is in the words and figures following, to wit:

42 In the District Court of the United States for the Southern District of California, Northern Division.

UNITED STATES OF AMERICA
*vs.*
PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS.

*Demurrer to the indictment.*

Come now the defendants above named, Pierre Grimaud and J. P. Carajous, and demur to the indictment returned and filed herein, and as grounds of demurrer allege:

I. That the facts stated in said indictment do not constitute a public offense against the United States.

II. That the acts of Congress referred to in said indictment, making it an offense to violate rules and regulations made and promulgated by the Secretary of Agriculture, are unconstitutional in that they are an attempt by Congress to delegate its legislative power to an administrative officer.

W. W. KAYE,
*Attorney for Defendants.*

43 And thereafter the above entitled court, by its order duly given, made and entered in said cause, all of the parties consenting thereto, ordered that the said demurrer be submitted to the court for its consideration and decision without oral argument and upon briefs to be filed by the respective parties; and the defendants, Pierre Grimaud and J. P. Carajous, having thereafter duly and regularly filed and served their opening brief in said cause, and the plaintiff, United States of America, having thereafter duly and regularly served and filed its brief in said cause, and the said defendants having thereafter duly and regularly served and filed their reply brief to the said brief of plaintiff; and the said briefs having been filed with the said court, and the matter having been duly and regularly submitted to the said court for its decision and judgment, the said court did thereafter, to wit, on the 3d day of May, 1909, duly and regularly render, give, make, and enter its final decision and judgment in said cause, in and by which said decision and judgment the said court did sustain said demurrer and dismiss said indictment, all for the reasons and upon the grounds, and those only, which are set forth in a certain written opinion, then filed by the court in this cause, which opinion is in the words and figures as follows:

44 In the District Court of the United States for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
*vs.*
PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS. } No. 2, Crim., N. D.

*Conclusions of the court on demurrer.*

The charge against defendants is that of grazing sheep, without permission, in the Sierra Forest Reserve.

By act of Congress, approved June 4th, 1897, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year 1897, and for other purposes," 30 U. S. Stat. L., 35, Compiled Statutes, 1901, page 1540, it is provided, among other things, that:

"The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or
45 such rules and regulations shall be punished as provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States."

The jurisdiction of the Secretary of the Interior over forest reserves was subsequently transferred to the Secretary of Agriculture, and, thereafter, on June 12th, 1906, the latter official promulgated the following:

"Regulation 45. All persons must secure permits before grazing any stock in a forest reserve, except the few head in actual use by prospectors, campers, and travelers, the milch or work animals not exceeding a total of six head owned by bona fide settlers residing in or near a forest reserve, which are excepted and require no permit."

A demurrer to the indictment has been interposed on the grounds that the act of Congress above mentioned, so far as it attaches a penalty to any violations of the rules and regulations thereafter to be made by the Secretary of the Interior, is void, because it does not completely or at all define the acts to be punished, and because it attempts a delegation of legislative power to an executive officer.

These two grounds will be considered in the order in which I have stated them.

The Supreme Court of the United States has often declared in unmistakable terms that there can be no crime against the authority

of the United States, except where the forbidden act is defined and penalized by statute. (U. S. vs. Hudson, 7 Cranch, 32; U. S. vs. Coolidge, 1 Wheat., 415; U. S. vs. Britton, 108 U. S., 199, 206; U. S. vs. Eaton, 144 U. S., 677.) And the Circuit Court of Appeals
46 for this circuit has spoken in decided terms to the same effect. (Peters vs. United States, 94 Fed., 127, 131.)

In United States vs. Hudson, supra, where it is held that the courts of the United States have no common law jurisdiction in criminal cases, the Supreme Court uses the following language:

"The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense."

In Peters vs. United States, supra, the court says:

"It must be borne in mind that the notional courts do not resort to common law as a source of criminal jurisdiction. Crimes and offenses cognizable under the authority of the United States can only be such as are expressly designated by law. It devolves upon Congress to define what are crimes, to fix the proper punishment, and to confer jurisdiction for their trial. U. S. vs. Walsh, 5 Dill., 60 Fed. Cas. No. 16,636; U. S. vs. Martin, 4 Cliff., 156, Fed. Cas. No. 15,728; In re Greene, 52 Fed., 104; Swift vs. Railroad Co., 64 Fed., 57; U. S. vs. Hudson, 7 Cranch, 32; U. S. vs. Coolidge, 1 Wheat., 415; U. S. vs. Britton, 108 U. S., 199."

The same doctrine has been elsewhere declared as follows:

"In the consideration of this indictment it should be borne in mind that there are no common-law offenses against the United States; that the federal courts cannot resort to the common law as a source of criminal jurisdiction; that crimes and offenses cognizable under the authority of the United States are such, and only such, as are expressly designated by law, and that Congress must define these crimes, fix their punishment, and confer jurisdiction to try
47 them." (In re Greene, 52 Fed., 104, 111.)

There can be no pretence that Congress itself has defined as a crime the act for which defendants are here indicted, namely, grazing sheep without permission in a forest reserve. The statute itself does not forbid or make any reference whatever to sheep grazing, nor in the remotest degree suggest that Congress had it at all in mind, and, according to the Government's own theory, it did not become a crime until nine years after the passage of the statute which the Government claims made it criminal, and then only because of the promulgation of an administrative rule which it contravenes. The mere statement of the theory, it seems to me, condemns it, and, after much reflection, I have now no hesitancy in holding that the statute, in so far as it affixed punishment to infractions of executive rules and regulations thereafter to be promulgated, is incomplete and wholly inad'quate to form the basis of a criminal prosecution.

It must be borne in mind that part of a statute may be unconstitutional and void and the residue constitutional and valid (28 Am. &

Eng. Ency. of Law, 2d ed., p. 570), and that there is no controversy here over the validity of any part of the act of Congress in question except the provision specifically indicated.

That provision was not before the court in Dastervignes vs. United States, 122 Fed., 30, and although it is mentioned, by way of recital, in the syllabus, there is not the slightest reference to it in the opinion, nor anything whatever to show or suggest its pertinency. Indeed, the question could not have arisen there, because the case was
48 not a criminal prosecution, involving, and which alone could involve, the matter of punishment, but simply a civil suit to enjoin grazing, and to which suit the penalty clause of the statute had no possible relation or pertinency.

The court specifically points out that part of the act which was before it, and held to be constitutional, as follows, underscoring mine:[a]

"It must be admitted that the legislative authority of the United States is vested in Congress, and that Congress has no authority to delegate legislative power to the Secretary of the Interior, or to any administrative officer the authority to make laws; and if the act of Congress approved June 4, 1897 (30 Stat. 35, U. S. Comp. St. 1901, p. 1540), is legally susceptible of the construction contended for by appellants, it would clearly be unconstitutional. By that act the Secretary of the Interior was authorized to '*make such rules and regulations and establish*lish *such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction.*' Does this language delegate any power to the Secretary of the Interior to make a law, or does it simply confer upon the Secretary an authority to adopt such rules and regulations as to him may seem fit and proper in order to secure the objects for which the reservation was created, and such acts to be exercised under and in pursuance of the law enacted by Congress? Let us see. Congress cannot delegate its power to make a law; but it can make a law to delegate a power to an administrative officer to determine a fact or condition of affairs in regard to which the law makes its own action depend."

49 The court now here holds, or intimates, that the statute is complete or valid in so far as it attempts to punish such acts as might thereafter be forbidden by the Secretary of the Interior; but it may be fairly inferred that the court would have held to the contrary if the question had been presented, from the following expressions at page 34 (underscoring mine).[a]

"The Secretary, by adopting this rule, acted simply as the arm that carries out the legislative will. He did not invade any of the functions of Congress. He did not ma*de any law*, but he exercised the authority given to him, and made *rules* to preserve the forests on the reservation from destruction. *Such rules*, within constitutional

[a] The underscored matter is that printed in italics.

limits, have the *force and effect of* law, and it is the duty of courts to protect and enforce them in order to uphold the law as enacted by Congress."

This declaration, clear and emphatic, that executive rules are not laws, taken in connection with the elementary principle already adverted to, that nothing but a law can define or create a crime, absolutely determines the incompleteness and inadequacy of said act of Congress as a penal statute.

Nor is the case of Union Bridge Co. vs. United States, 204 U. S., 364, applicable here. The statute there involved declares the maintenance, after notice from the Secretary of War, of any bridge which unreasonably obstructs free navigation to be a misdemeanor, punishable by a fine not exceeding five thousand dollars, and, furthermore, in substance and effect, though not in terms, makes the final order of the Secretary, for which it provides, conclusive evidence as to the fact of unreasonableness. (30 U. S. Stat. L., 1121, 1153.)

50 This statute, it will be seen, fully defines the crime and affixes the punishment, and is, therefore, complete within itself. Its only peculiarity is that, as I have already indicated, it impliedly establishes in that class of cases a special rule of evidence. This, however, is clearly within the scope of legislative power, and not unfrequently done, either by implication, as above shown, or in express terms, as appears from the instance below cited. Thus section 16 of the act of Congress approved August 6, 1846, entitled "An act to provide for the better organization of the Treasury, etc.," contains a provision subsequently embodied in section 5494 of the Revised Statutes, which reads as follows:

"Upon the trial of any indictment against any person for embezzling public money under the provisions of the six preceding sections, it shall be sufficient evidence, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the Treasury, as required in civil cases, under the provisions for the settlement of accounts between the United States and receivers of public money." (Secs. 5494, U. S. Rev. St.; 9 U. S. Stat. L., 63.)

Examples to the same effect might be multiplied, but the one just referred to sufficiently illustrates the exercise of legislative power in the matter of special procedure.

While the conclusion which I have above announced as to the incompleteness of the statute here in question disposes of this case favorably to the defendants, yet, inasmuch as the other ground of the demurrer is the one most largely, if not wholly, discussed in the

51 briefs, and touches closely a principle of high moment, I shall give it hurried consideration.

There is no feature of our Government more distinctive or beneficent than the division of its powers into separate departments, and, therefore, the rule which confined the making of laws to Congress is at once elementary and inflexible.

Concerning this rule the Supreme Court of the United States has made the following declaration:

"That Congress can not delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." (Field vs. Clark, 143 U. S., 650, 692.)

There can be no controversy whatever about the principle itself; the only room for dispute lies in its application. In the case at bar, the statute does not declare the grazing of sheep without permission to be a crime, nor does it make the slightest reference to that matter, but declares that whatever the Secretary of the Interior may thereafter prohibit shall be a misdemeanor. Congress merely prescribes a penalty and then leaves it to the Secretary of the Interior to determine what acts shall be so punishable. Thus, it will be seen that the very essence of the alleged crime, namely, what act shall constitute it, is not fixed by Congress, but wholly confided to the discretion of an administrative officer. If this does not necessarily involve a delegation of legislative power, it is difficult to conceive of a statute challeng'able on that ground.

While arguments ab inconvenienti of themselves are rarely
52 conclusive, yet in many cases they are entitled to much weight, and this is one of the cases; for, if the contentions which the Government here urges were to prevail, Congress, so far as any legal difficulties are concerned, could easily abdicate in favor of the executive department practically all its powers.

To illustrate: Among the large number of crimes relating to the postal service is the use of the mails for immoral and fraudulent purposes. Congress could repeal existing legislation on this subject, and, by a new law, authorize and require the Postmaster-General to protect the mails against immoral and fraudulent uses, by suitable rules and regulations, and further provide that any violations of such rules and regulations should be punished in a specified manner, and under this grant of authority said officer could occupy with regulations, spring from his own discretion and will, but enforc'able through penal sanctions, the large field now covered by the criminal laws on that subject, and in this way it would be possible to confer upon the administrative branches of the Government powers whose full exercise would substitute with penalized rules well night the whole volume of federal criminal law. It is needless to add that no reasonable interpretation of the Constitution will admit of such a startling result.

This precise question has been under review and ably discussed in another jurisdiction, as follows:

"It is fundamental that the citizen has the right to rely upon the statutes of the United States for the ascertainment of the acts which constitute an infraction of its laws. This principle was expressed by the Supreme Court in Re Kollock, 165 U. S., 533, as follows:

53 "'We agreed that the courts of the United States, in determining what constitutes an offense against the United

States, must resort to the statutes of the United States, enacted in pursuance of the Constitution.'

"A citizen desiring to obey the laws would search the acts of Congress in vain to find that grazing sheep upon a forest reserve without the permit of the Secretary of Agriculture is a criminal offense. It has been suggested that the acts under which the indictment is drawn give notice that the Secretary may make rules and regulations, and that the search would not be complete and the inquiry concluded until it be ascertained whether he has made any rules and regulations, the violation of which it is expressly declared shall be a criminal offense. But here we are led back to the delegation of legislative power. The rules prescribed by the heads of departments are not necessarioy promulgated. While they may be procured, they are not as easily available as are the statutes of the United States; nor does our system contemplate an examination of those rules for the ascertainment of that which may or may not be a crime, for the right to prohibit a given thing under penalty belongs to Congress alone.

* * * * * * *

"In discussing the statute the Supreme Court laid down this wholesome doctrine:

"'Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an
54 act committed or omitted "in violation of a public law, either forbidding or commanding it." (4 American & English Encyclopedia of Law, 642; 4 Bl. Com., 5.) It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the ole'margarine act, for carrying it into effect, could be considered as a thing "required by law" in carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under section 18 of the act. * * * It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense, and we do not think that the statutory authority in the present case is sufficient.'

"To like effect are United States vs. Maid (D. C.), 116 Fed., 650, and United States vs. Blasingame (D. C.), 116 Fed., 654.

"Have we here a case involving the delegation of legislative power? That Congress intended to punish by penalty made certain the violations of regulations made by the Secretary of Agriculture, and to declare the same a criminal offense, is beyond controversy. But the grazing of stock upon the forest reserves has not been prohibited by any congressional act. The prohibition rests entirely upon regulations made by the secretary. Regulation No. 9 prescribes, as we have seen, that all persons before grazing sheep in a forest reserve must secure a permit, and any person responsible for grazing the same without

a permit becomes a violator of the law; that is, whoever violates a rule promulgated by the Secretary violates a law passed by
55 Congress. The evident embarrassment attending the making of regulation 9, in an attempt to bring it within the act of Congress, is apparent by the language used. Clearly there was a keen appreciation of the necessity of supplying that which Congress had failed to enact, and this was attempted by the use of the words 'is liable to punishment for violation of the law.' At times the line is somewhat indistinct between that which constitutes the delegation of legislative power and the delegation of administrative authority.

"This case does not fall within the rule so well explained and amplified by the authorities that the executive branch of the Government may make proper rules and regulations for carrying into effect the legislative will of Congress. The President may be authorized to declare by proclamation that a law shall go into effect upon the happening of a certain contingency. The Secretary of the Treasury may make rules and regulations for the enforcement of the revenue statutes and the like. So may the heads of all the departments make like regulations, but the authority to do so must be expressly delegated, and the law must be complete in itself. The rules and regulations may only be prescribed for carrying out what Congress has expressly declared to be the law. Such powers do not pertain to the legislative functions, but are referable to administrative duties. Congress can not leave a statute to be enlarged upon either by the courts or the executive department. It can not authorize any other branch of the Government to define that which is purely legislative, and that is purely legislative which defines rights, permits things to be done, or prohibits the doing thereof. Certainly here, it is the Secretary of Agriculture who has undertaken to enact this
56 law. He it is who has designated that which constitutes the crime. The thing prohibited, the thing for which the party is to be punished, the act which is the offense, is prescribed by the Secretary, and not enacted by Congress. As we have seen, this can not be done.

"The objection to the indictment is the absence of a law defining the act therein charged as a criminal offense. Upon that ground the demurrer must be sustained, and the defendant discharged." (United States vs. Matthews, 146 Fed., 306, 308.)

See also United States vs. Maid, 116 Fed., 650; and United States vs. Blasingame, 116 Fed., 654.

In the former of said cases, at page 652 it is said:

"There is another aspect of the case, however, which furnishes as strong an argument against plaintiff's contention as the one just considered, and it is this: A department regulation may have the force of law in a civil suit to determine property rights, as in Cosmos Exploration Co. vs. Gray Eagle Oil Co., supra, and yet be ineffectual as the basis of a criminal prosecution. (U. S. vs. Eaton, supra.) The

Supreme Court of the United States, in the case last cited, marks the distinction thus:

"'Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them; and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do this thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense.'

57 "The obvious ground of said distinction is that to make an act a criminal offense is essentially an exercise of legislative power, which can not be delegated, while the prescribing by the President or head of a department, thereunto duly authorized, of a rule, without penal sanctions, to carry into effect what Congress has enacted, although such rule may be as efficacious and binding as though it were a public law, is not a legislative, but a ministerial function."

In the latter of said cases, United States vs. Blasingame, 116 Fed., 654, the opinion is brief and as follows:

"I am of opinion that the act (act June 4, 1897, 30 Stat., 11), entitled 'An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes,' in so far as it declares to be a crime any violation of the rules and regulations thereafter to be made by the Secretary of the Interior for the protection of forest reservations, is in substance and effect a delegation of legislative power to an administrative officer. While the Supreme Court of the United States, in Field vs. Clark, 143 U. S., 649, and also In re Kollock, 165 U. S., 526, held that there was no unconstitutional delegation of power in either case, yet, applying and observing here the principles and distinctions there enunciated and recognized, it is impossible to escape the conclusion which I have announced. U. S. vs. Eaton, 144 U. S., 677, although not precisely like the case at bar, may also be aptly cited in support of said conclusion. Clear statements and pertinent applications of the doctrine announced by the Supreme Court of the United States in the two cases first

58 above cited that legislative power can be exercised only by that branch of the Government to which the Constitution commits it, will be found in People vs. Parks, 58 Cal., 624; Ex Parte Cox, 63 Cal., 21; and Board of Harbor Com'rs vs. Excelsior Redwood Co., 88 Cal., 491."

I have given to the extract quoted in plaintiffs' brief from an opinion by former Attorney-General Griggs, that respectful attention which the high character and distinguished ability of its writer, as well as the great office he then held, demands, and can but think that the quotation rests upon a superficial view of the subject.

It starts out with an assumption which, to my mind, is manifestly erroneous, namely, that "The statute proclaims the punishment for

an offense which in general terms is defined by law, the regulation dealing only with a matter of detail and administration, necessary to carry into effect the object of the law." The statute, and I refer, of course, only to that provision now under consideration, so far from proclaiming the punishment for an offense which in general terms is defined by law, does not even purport to punish a transgression of law, but the prescribed penalty is affixed to the violation of such rules as the Secretary in his discretion might subsequently make, and which in fact, as I have already indicated, were not made until nine years after the statute was enacted.

Again the quotation: "Suppose Congress had provided that the occupation or use of a forest reservation by any person without permission of the Secretary should be a misdemeanor, would this not be a valid exercise of legislative power?" The answer to this
59 question must be in the affirmative, because, in the case supposed, the statute is complete within itself. The legislative power has been duly exercised in prescribing the act which constitutes the crime; but, when the quotation goes on to add, "The present statute does no more," another erroneous postulate, as it seems to me, is assumed. Congress has nowhere declared that the grazing of sheep in a forest reservation without permission of the Secretary is a misdemeanor, but the alleged crime results only from the joint operation of the statute and a rule subsequently made by the Secretary. Without the rule there is nothing to which the penalty can attach, and in order to charge the so-called crime, it is necessary, as has been done here, to allege the promulgation and infraction of the rule, without which the statute is wholly devoid of force or effect.

The cases mainly relied on by the Government are Dastervignes vs. United States and Union Bridge Company vs. United States, supra. In the former, as I have already shown, the penalty clause of the statute was not before the court, and, besides, there are views expressed in the opinion utterly incompatible with the constitutionality of said clause, and that case, therefore, so far as applicable at all, is against rather than favorable to the Government's claim.

In the other case, Union Bridge Company vs. The United States, the crime was fully defined, and the punishment fixed by statute, and the duties devolved upon the Secretary of War were only administrative acts in aid of the execution of the statute.

In its opinion, at page 382, the court quotes approvingly from a prior decision, Field vs. Clark, as follows:
60 "'He was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea, and hides, from particular countries, should be suspended in a given contingency, and that in case of such suspensions certain duties should be imposed.' Again: 'The true distinction,' as Judge Ranney, speaking for the Supreme Court of Ohio, has well said, 'is between

the delegation of power to make the law, which necessarily involves a discretion as to what it shall be and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made.' Cincinnati, Wilmington, &c., Railroad vs. Commissioners, 1 Ohio St., 77."

Again, at page 385, the court says:

"As appropriate to the object to be accomplished, as a means to an end within the power of the National Government, Congress, in execution of a declared policy, committed to the Secretary of War the duty of ascertaining all the facts essential in any inquiry whether particular bridges, over the waterways of the United States, were unreasonable obstructions to free navigation. Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through executive officers, could have determined for itself, primarily, the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could by direct legislation have re-
61 quired the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the waterway in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case, separately, would be impracticable in view of the vast and varied interest which require national legislation from time to time. By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power."

There the crime was created—that is, it was defined and the punishment affixed by the statute itself, and, as above stated, the duties which the statute devolved upon the Secretary of War were only in aid of its enforcement.

If I am correct in the views which I have expressed of the Dastervignes case, then two of the other cases relied on by the Government, United States vs. DeGuierre, 152 Fed., 568, and Dent vs. United States, 76 Pac. Rep., 455, are unfavorable to its contention, because, in each a contrary decision was overruled, solely on the authority and under a mistaken apprehension of the Dastervignes case, indi-
cating that both of said courts, if uncontrolled by the
62 Dastervignes case, would hold the statute void. On the first hearing in the latter case, Dent vs. United States, 71 Pac.,

920, 922, the opinion is elaborate, able, and convincing, and, with uncommon force and clearness, compresses into a single paragraph its unanswerable argument, as follows:

"We think the fatal defect of the act, so far as the question in the case at bar is concerned, is that unlimited power is given thereby to the Secretary of the Interior to determine what is and what is not a crime under the act. It is left to his discretion to determine the acts or omissions which shall render all persons amenable to the criminal law. The act does not prohibit the grazing of sheep on forest reserves, and there is no statute which prohibits it. Whether or not in all cases the authority of the several heads of the departments of the Federal Government to make regulations for their respective departments is limited to the precise and literal terms of the acts of Congress applicable thereto, we think that, in so far as by such regulations an act is defined to be a crime which is not so defined by any public law, and which, without such regulation, would not be a crime, or punishable as such, it is an exercise of lawmaking power, vested by the Constitution, not in such official, but in Congress alone, and as such is unconstitutional."

In most, if not all of the cases relied upon by the Government, the authority delegated was limited to the ascertainment of facts in particular cases, and these were held to be administrative acts. In the case at bar, however, there is no pretence, that the Secretary of Agriculture has been charged with the duty, or has acted in the
63 ascertainment of the facts of particular cases, but what he has undertaken to do is to determine and define a crime, which, according to all the authorities, is a matter of legislative discretion.

In United States vs. Shannon, 151 Fed., 863, 865, the court says:

"Let us remember that we are not now dealing with a question of a regulation by the Secretary of the Interior, which makes a violation thereof a crime. Were such the point of inquiry, principles not necessarily here applicable would have to be discussed. United States vs. Eaton, 144 U. S., 677; United States vs. Matthews (D. C.), 146 Fed., 306. We can therefore eliminate any question of the liberty of the citizen, and proceed to inquire into the matter of the policy of the State concerning cattle growers, to ascertain the force of that policy in the present instance."

From this it appears that the court, in the last case, was careful to avoid any expression which might be applied to the question here under consideration.

Plaintiff, in its brief, advances the proposition that "The Government, in dealing with forest reservations, is acting not only in its sovereign capacity, but as a landed proprietor," and seeks to draw therefrom the inference that trespasses upon such reservations become crimes without legislation to that effect. This inference, to my mind, is obviously a non seqitur. The fact that the Government may be endeavoring to protect its own lands in no way affects the vital principle of our Constitution, as it is distinctively called by

the Supreme Court, which forbids the delegation of legislative power.

64 In the clause quoted in plaintiff's brief with emphasis from Canfield vs. United States, 167 U. S., 518, 525, "If the act be construed as applying only to fences actually erected upon public lands, it is manifestly unnecessary, since the Government as an ordinary proprietor would have the right to prosecute for such a trespass," the words "prosecute for such a trespass" manifestly refer to civil suits, such as the one then before the court.

The government's contention on this branch of the case is fully met by the numerous Supreme Court decisions hereinbefore cited, to the effect, that, under the federal system there can be no crimes except such as are created, that is expressly defined and penalized, by an act of Congress.

The demurrer to the indictment will be sustained.

OLIN WELLBORN, *Judge.*

To which decision and judgment of the court, so for the reasons and upon the grounds aforesaid, sustaining the said demurrer to the said indictment and ordering said indictment dismissed, and to the whole of said decision and judgment, the United States of America, by its counsel, then and there duly excepted, which said exception was then and there duly and regularly entered in the minutes of said court.

And forasmuch as the foregoing matters do not appear of record, the plaintiff tenders this, its bill of exceptions, and prays that the same may be signed and allowed and duly authenticated and

65 made a part of the record herein, which is accordingly done this 18th day of May, 1909.

OLIN WELLBORN, *District Judge.*

Service of the foregoing proposed bill of exceptions is hereby admitted this 15th day of May, 1909, and it is hereby stipulated that the same is correct and may be settled, approved, and allowed as the bill of exceptions to be used upon writ of error from the Supreme Court of the United States in the above entitled cause.

W. W. KAYE,
*Attorney for Defendants Pierre Grimaud and J. P. Carajous.*

(Endorsed:) No. 2, Crim., N. D. In the District Court of the United States for the Southern District of California. The United States of America, plaintiff, vs. Pierre Grimaud and J. P. Carajous, defendants. Bill of exceptions. Filed May 18th, 1909. E. H. Owen, clerk. A. I. McCormick, United States attorney.

66 In the District Court of the United States in and for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS. } No. 2 Crim., N. D.

*Certificate of Court.*

I, the undersigned, Olin Wellborn, United States district judge for the Southern District of California, do hereby certify that the decision and judgment in the above entitled cause, given, made, rendered, and entered by this court on the 3d day of May, 1909, and which said decision and judgment the plaintiff, The United States of America, is taking to the Supreme Court of the United States by writ of error, and in and by which said decision and judgment the demurrer to the indictment was sustained and the said indictment dismissed, was based solely upon the invalidity and construction of those portions of the act of Congress approved June 4, 1897, entitled, "An act making appropriations for sundry civil expenses of the Government for the fiscal year 1897, and for other purposes" (30 Statutes at Large, 35), upon which the indictment was founded.

I further certify that the reasons and grounds for the said decision and judgment are given and set forth in full in the written conclusions of this court filed in this cause on said 3d day of May, 1909, a copy of which said conclusions are incorporated in the bill of exceptions in this cause.

Dated May 18th, 1909.

OLIN WELLBORN, *District Judge.*

67 (Endorsed:) Original No. 2, Crim., N. D. In the District Court of the United States for the Southern District of California, Northern Division. United States of America, plaintiff, vs. Pierre Grimaud and J. P. Carajous, defendants. Certificate of Court. Filed May 18th, 1909. E. H. Owen, clerk.

68 In the District Court of the United States in and for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS. } No. 2, Crim., N. D.

*Order allowing writ of error.*

Honorable Olin Wellborn, judge.

Upon reading and filing the petition of the United States of America, plaintiff in the above entitled cause, praying for the allowance of a writ of error in the above entitled cause returnable before the

Supreme Court of the United States, and upon reading and filing the assignment of errors presented with said petition, and on motion of A. I. McCormick, esq., United States attorney for the Southern District of California,

It is hereby ordered that said petition be and the same hereby is allowed and granted; and

It is further ordered that a writ of error be and the same hereby is allowed to have reviewed in the Supreme Court of the United States the decision and judgment sustaining the demurrer of the defendants to the indictment and dismissing said indictment, heretofore given, made, rendered, and entered in the above entitled cause, and that said writ of error be issued by the clerk of the Circuit Court for this district, under the seal of said Circuit Court, pursuant to section 1004 of the Revised Statutes of the United States; and

It is further ordered that a certified transcript of the record, proceedings, and papers herein be transmitted to the said Supreme Court of the United States; and

69 It is further ordered that pending the prosecution and determination of said writ of error, the defendants, Pierre Grimaud and J. P. Carajous, shall be admitted to bail on their own recognizance.

Dated this 18th day of May, 1909.

OLIN WELLBORN,
*Judge of the United States District Court,*
*Southern District of California.*

(Endorsed:) Original. No. 2, Crim., N. D. In the District Court of the United States for the Southern District of California, Northern Division. The United States of America, plaintiffs, vs. Pierre Grimaud and J. P. Cazajous, defendants. Order allowing writ of error. Filed May 18th, 1909. E. H. Owen, clerk.

70 In the District Court of the United States for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
*vs.*
PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS. } No. 2 Crim., N. D.

*Order extending time.*

Good cause appearing therefore, it is hereby ordered that the plaintiff, United States of America, may have up to and including the 2d day of June, 1909, in which to prepare, serve, and file its proposed bill of exceptions in the above-entitled cause.

Dated this 13th day of May, 1909.

OLIN WELLBORN, *District Judge.*

(Endorsed:) Original. No. 2 Crim., N. D. In the District Court of the United States for the Southern District of California,

Northen Division. The United States of America, plaintiffs, vs. Pierre Grimaud and J. P. Carajous, defendants. Order extending time. Filed May 13, 1909. E. H. Owen, clerk.

71 In the District Court of the United States for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS. } No. 2, Crim.

I, E. H. Owen, clerk of the District Court of the United States of America in and for the Southern District of California, do hereby certify the foregoing seventy (70) typewritten pages, numbered from 1 to 70 inclusive, and comprised in one volume, to be a full, true, and correct transcript and copy of the pleadings, and all proceedings, orders, and papers (exclusive of recognizances and briefs) upon which the demurrer was sustained and the indictment dismissed in said cause, and the decision and judgment of the court, and the written opinion or conclusions of the court, and also of the bill of exceptions, assignment of errors, petition for writ of error, order allowing writ of error, and the certificate of the court, in the above and therein entitled cause, and that the same together constitute the return to the annexed writ of error.

In testimony whereof I have hereunto set my hand and affixed the seal of said District Court of the United States of America this 26th day of May, in the year of our Lord one thousand nine hundred and nine and of the Independence of the United States the one hundred and thirty-third.

[SEAL.]

E. H. OWEN,
*Clerk of the United States District Court for the Southern District of California.*

(Indorsement on cover:) File No. 21,716. S. California D. C. U. S. Term No. 490. The United States, plaintiff in error, vs. Pierre Grimaud and J. P. Carajous. Filed June 8th, 1909. File No. 21,716.

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